IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.359 OF 2000

Mohammed Yakub @ Aku Shafi Mohd.Khan
age about 20 years, Occ.Hamal residing
at Khairani Road, Saki Naka,
Mumbai .. Appellant.

V.

The State of Maharashtra .. Respondent.

Mr.K.P.Mishra and Mr.S.B.Keshwani advocate on record absent. Shri Arfan Sait appointed as amicus curiae for the appellant.

Shri S.S.Tatkare APP for the respondent.

CORAM : SMT.RANJANA DESAI &
D.B.BHOSALE, JJ.

DATED : 21ST JULY, 2005.

JUDGMENT: (PER D.B.BHOSALE, J.)

1. This appeal is directed against the judgment and order dated 6.4.2000 rendered by the Additional Sessions Judge, Greater Bombay in Sessions Case No.378/1998 convicting the appellant/accsued of the offence under section 302 of the Indian Penal Code and awarding sentence to suffer imprisonment for life. The allegations against the accused was that in the intervening night between 19.12.1997 and 20.12.1997 he committed murder of Ajimulla @ Jumman Mohd. Munir by means of hammer and iron weight of 5 Kgs. as

also by strangulation.

2. The prosecution case, in brief, is as follows: Deceased - Jumman was a coolie (Hamal). He used to sleep in a Gala of Mohd.Taqui (PW.1) and Siraj (PW.2). Taqui (PW.1) and Siraj (PW.2) were partners and they were engaged in the business of scrap. They had their gala No.B/10 at D.P.K.Compound, Khairani Road, Mumbai. On 20.12.1997 as usual Siraj (PW.2) went to his business premises and found that Jumman was lying dead with head injury in the said premises. He also found that one lungi was tied around the neck of Jumman. He immediately informed to Taqui (PW1), who after visiting the scene of occurrence lodged F.I.R. with the police. The police recorded his statement and carried out further investigation. They recorded statements of several witnesses and drew panchanamas. After five days the accused came to be arrested as a suspect. After completing the investigation, the charge-sheet was filed and the case was thereafter committed to the Sessions Court. The defence propounded by the accused was of total denial. To bring home the guilt of the accused the prosecution examined eight witnesses consisting of Subbirali Sha (PW.3) and Kurilal Vishwakarma (PW.4), who claim that they had last seen the accused and deceased together on the

previous night. Since there was no direct evidence the prosecution relied upon the following circumstances to prove the guilt of the accused: last seen together, motive, recovery of the articles by which Jumman was allegedly killed, C.A. report and conduct of the accused.

3. Mr.Arfan Sait, learned counsel appointed as an amicus curiae for the appellant took us through the entire evidence and contended that there is absolutely no evidence against the accused to connect him with the alleged occurrence. The evidence led by the prosecution against the accused does not inspire confidence. This being a case of circumstantial evidence none of the circumstances much less the circumstance last seen together has not been proved by the prosecution beyond reasonable doubt. The prosecution witness Subbirali Sha (PW.3) and Vishwakarma (PW.4) claim that they had last seen the accused and the deceased together on previous night. However, according to Mr.Sait, their evidence also does not disclose clearly that they had last seen the accused and the deceased on previous night. Even the alleged motive that the deceased was killed by the accused for money has also been not established by the prosecution beyond reasonable doubt. The recovery of clothes of the accused also do not

connect accused with the alleged offence since no blood stains were found by the Chemical Analyst on the said clothes. On the other hand Mr.Tatkare, learned A.P.P. submitted that totality of the circumstances clearly point to guilt of the accused. The evidence of Sha (PW.3) and Vishwakarma (PW.4) read with the evidence of recovery pancha is sufficient to hold the accused guilty of the alleged offence. He submitted that the conduct of the accused also supports the prosecution case. He submitted that blood was not found on the clothes since the accused washed his clothes. The recovery of articles used by the accused for killing the deceased clearly connect him with the alleged occurrence. The evidence of PW.3 and PW.4 is fully fortified by the recovery pancha and the evidence of Dr.Shinde (PW.6).

4. Before we proceed to reappreciate the evidence placed on record it would not be out of place to mention that though the impugned judgment runs into about 21 pages the reasons recorded by the learned Judge after formulating the points for determination are hardly running into one and half page. We found the approach of learned Judge in dealing with the case under section 302 of Indian Penal Code absolutely casual. There is no marshalling of the evidence in the impugned

judgment. The accused in the present case is languishing in the jail since last more than 7-8 years. We, therefore, went through the entire evidence placed on record very carefully and perused the impugned judgment with the assistance of the learned counsel appearing for the parties.

5. Mohammed Taqui (PW.1) and Siraj Ahmed (PW.2) are the business partners and in their business premises dead body of Jumman was found in the morning on 19.12.1999. The evidence of these two witnesses shows that when Siraj Ahmed PW.2 opened gala no.B-10 at Khairani Road, Saki Naka, business premises at 8.30 a.m. on 19.12.1999 he found Jumman lying in the premises in a pool of blood and was having head injury. He immediately informed Mohd. Taqui (PW.1) . PW.1 also rushed to their business premises and after seeing the dead body of Jumman he went to the police and lodged the complaint. It appears that on the basis of the complaint lodged by PW.1 the police set investigation in motion. Their evidence does not support the prosecution to connect the accused with the murder of Jumman. Their evidence only shows that Jumman used to sleep in their business premises and had one key of the premises with him. Heavy reliance was, therefore, placed on the evidence of Subbirali Sha (PW.3) and Kurilal

Vishwakarma (PW.4) by the prosecution to prove two circumstances, namely, last seen together and the motive. Subbirali Sha (PW.3) turned hostile. He did not support the prosecution case in so far motive is concerned. In the cross examination by learned P.P. the contradiction has been brought on record which shows that PW.3 had stated before the police his conversation with the accused on previous night in which the accused had told him that they would rob the money of Jumman. His evidence, however, has been relied upon by the trial Court to hold the circumstance last seen together as proved. He has stated that on the previous night he met the deceased - Jumman and the accused at 10.00 p.m. when they were sitting together. He had gone to meet Jumman for collecting his payment of the work which Yakub, Jumman, Gujju and Nankai had done earlier. This witness has, however, clearly stated that the relation between Jumman and Yakub were cordial and he does not suspect anyone for the murder of Jumman. A perusal of his testimony, in our opinion, does not inspire confidence and probably that was reason why he was required to be declared hostile. His evidence, in our opinion, is not safe to arrive at a conclusion that he had seen the deceased in the company of accused on the previous night. Kurilal Vishwakarma (PW.4) is another

witness. He was also examined by the prosecution to prove the circumstance last seen together. His examination in chief is running into hardly ten lines which read thus:

> . "I am staying at above address for last about 8 years. I am a hamal on a scrap truck. I knew Jumman. I have worked with him. There are several persons like me. One of them by name Yakub is present in the court today. (Witness points out the accused in the dock) Jumman is no more. He died 2-3 years back. I met him on the way of my work. I met him late evening on that day. I was on my way to the lavatory and found Jumman and a boy smoking beedies. On return, I did not see both of them. I only know that they were working together. I did not meet Yakub thereafter".

5.1. He has not stated over and above what has been stated in the quoted paragraph of his testimony. It is not clear from his testimony that he had last seen the deceased in the company of accused. It is also not clear that the boy to whom he has referred to in his examination in chief was the accused - Yakub. The evidence of PW.3 and PW.4, in our opinion, do not inspire confidence and in any case on the basis of testimony of these two witnesses it would not be possible for us to hold that the circumstance last seen together and motive has been proved by the prosecution. Except the testimony of PW.3 no other witness speak about alleged motive. PW.3 has also not supported the prosecution to prove motive. In the circumstances,

the main links in the chain of circumstances, in our opinion, are missing and/or not proved by the prosecution beyond reasonable doubt. Insofar as recovery of the hammer and 5 Kgs. weight, allegedly used by the accused to kill Jumman, is concerned that also would not help the prosecution since there is no substantive evidence against the accused. In other words even if the recovery of these articles is taken as proved, in the absence of other material to connect the accused with the murder of Jumman, it would not help the prosecution to prove his guilt. It is very pertinent to note that no blood was detected on the hammer and 5 Kgs. weight. C.A. report does not support the prosecution case at all. No blood was found on the clothes of the accused. We are left to wonder, as to on what basis the learned trial Judge holds that the clothes of the accused were washed. The C.A. report does not say so. The accused was arrested simply on suspicion. The testimony of Dr.Ashok Shinde (PW.6) also does not take the prosecution case any further. He only speaks about the injuries sufferred by the deceased. There is absolutely no evidence rendering the prosecution story even probable. No circumstance in our view has been proved by the prosecution beyond reasonable doubt. It would not be wrong if we observe that this is a case of no evidence. In the

result, we are left with no other alternative but to acquit the accused of the charge under section 302 of the Indian Penal Code for allegedly killing Jumman in the intervening night of 19.12.1997 and 20.12.1997.

6. In the circumstances the appeal succeeds and is, therefore, allowed. The impugned judgment and order dated 6.4.2000 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No.378/1998 is quashed and set aside. The appellant is directed to set at liberty forthwith, if not required in any other case.

7. Before we close, this court record its appreciation to Mr.Arfan Sait, learned counsel for the assistance rendered to this Court. We quantify the fees of Mr.Arfan Sait, learned counsel appointed by us as Rs.750/- for this appeal.

(Smt.Ranjana Desai,J.)

(D.B.Bhosale, J)